

IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 15 OF 1997.

Zuari Estate Development
and Investment Company
Private Limited, a
Company incorporated
under the Companies Act,
1956 and having its
Administrative Office
at Salgaocar Chambers,
Margao.

... Petitioners.

Versus

1. Shri J.R. Kanekar,
Deputy Commissioner
of Income Tax
(Assessment) Special
Range, Panaji, having
his office at Pundalik
Niwas, Panaji.
2. Union of India through
the Secretary to
Government of India,
Ministry of Finance,
New Delhi.

... Respondents.

Mr. Porus F. Kaka, Mr. D. Pangam and Ms. Gandha Sambari,
Advocates for the Petitioners.

Mr. S.R. Rivonkar and Ms. Amina Fadte, Advocates for the
Respondent No. 1.

Coram : F.I. REBELLO AND
P.V. HARDAS, JJ.

Date : 30th July 2003.

ORAL JUDGMENT (PER REBELLO, J.)

The petitioner company carries on business of hiring of plant and machinery. The petitioner had by an Agreement, dated 28th June 1982, entered into with Prerna Premises Private Limited, agreed to purchase three office premises, being office premise nos. 22, 22A and 23 in Maker Chambers III, at Nariman Point,

Bombay-400 021 as well as four open car parking spaces, being car parking space nos. 17 to 20, for a total cost of Rs. 28,66,634/-. It is the case of the petitioner that it subsequently became a member of the Maker Chambers III Premises Co-operative Society Limited. By an Agreement, dated 19th June 1984, entered into between the petitioner and the Bank of Maharashtra, the petitioner agreed to sell and the Bank agreed to purchase from the petitioner all the right, title and interest of the petitioner in the said office premises and car parking spaces for a consideration, which was to be calculated at the rate of Rs. 1,600/- per square foot for the office premises and at Rs. 80,000/- for each of the car parking spaces. Under Clause 2 of the Agreement the consideration was to be discharged in the following manner:- Rs. 2,00,000/- as earnest money before the execution of the Agreement and the balance to be paid at the time of execution of final document of sale and transfer of the property by the petitioner. It was also provided that if the petitioner puts the bank in possession of the premises before execution of the final document of sale and transfer, then the Bank was to pay to the petitioner 95% of the total consideration as reduced by Rs. 2,00,000/- and the balance of 5% on the execution of the final document of sale. Clause 3 of the Agreement provided that from the date the Bank was put in possession of the premises, the Bank would be

liable to pay the maintenance charges, municipal taxes, cesses and all other outgoings in respect thereof. Clause 5 provided that the sale of the premises would be completed only after expiry of five years from the date of the Agreement but before the expiry of the sixth year from the date of the Agreement, time being the essence of the contract. The Agreement further provided that the Bank would have an option either to complete the transaction or rescind the same and, in the event the Bank rescinded the Agreement, the petitioner would refund the entire amount that may have been paid by the Bank to the petitioner within one year of the rescission on return of possession of the premises by the Bank. It was further agreed that the parties would sign such papers and documents as were necessary for completion of the sale on payment of the full purchase price payable by the Bank to the petitioner. By Clause 9 of the Agreement, the Bank had agreed that once the Bank was put in possession of the premises, they would not sell, transfer, assign, let out or give on leave and licence basis or in any other manner part with possession of the premises or any portion or portions thereof to anyone else pending completion of the sale. After the Bank had paid to the petitioner, on 20th June 1984, the sum of Rs. 84,47,111/-, being 95% of the consideration agreed upon, the petitioner put and handed over possession in part performance of the Agreement of sale to the Bank on

20th June 1984 itself.

2. By letter of 12th June 1990, in terms of Clause 5 of the Agreement of Sale, dated 19th June 1984, the Bank called upon the petitioner to complete the transaction and convey the property to the Bank by 18th June 1990. It is the case of the petitioner that certain disputes had arisen owing to which the petitioner did not complete the transactions. By letter of 16th June 1993, the petitioner confirmed that the petitioner had put the premises in possession of the Bank and that the petitioner would take all necessary steps for transfer of the said premises on or before 30th September 1993. It is the case of the petitioner that even thereafter, the petitioner was unable to complete the transactions and there were demands by the Bank on the petitioner to complete the transaction. The rest of the averments regarding the dispute between the Bank and the petitioner need not be adverted to. Suffice it to say that the petitioner had also recorded, confirmed and assured the Bank that it would take all steps for transfer of the property alongwith the share certificates on or before 30th September 1997. It is the case of the petitioner that in view of the uncertainties prevailing and the fact that the transfer of premises had not been completed, the petitioner in the accounts of the year 1991 had disclosed the amount

of Rs. 84,47,111/- received by it as a current liability under the heading "Advance against deferred sale of building". Note no. 2 of the notes of accounts forming part of the balance sheet as on 31st March 1991 reads as under:-

"The Company has entered into an agreement for sale of above buildings vide agreement dated 19-6-84 which inter alia provides that the sale of the said buildings shall be completed only after the period of expiration of five years from the date of agreement but before the expiration of sixth year at the option of the purchasers to complete the transaction or to rescind the same for a sum of Rs. 85,40,800/- plus reimbursement of non-refundable deposits, transfer fees etc. A sum of Rs. 84,47,111/- (being 95% of consideration agreed upon Rs. 81,13,760/- deposits Rs. 1,27,831/- and transfer fees Rs. 2,05,520/-) received from the purchasers have been shown under the head Current Liabilities and the possession of the buildings was given to the purchasers on 20-6-84 and they have agreed to reimburse the Company the outgoings of the said building. The Purchasers, though have exercised the option to purchase the same, the execution of the sale and conveyance is not completed pending negotiations with the purchasers and hence no adjustments in this regard have been made in the books of accounts of the Company."

The petitioner filed its return of income for the Assessment year 1991-92 on 31st December 1991. Alongwith the return, the profit and loss account as well as the balance sheet were also enclosed. The notes on accounts referred to earlier, according to the

petitioner, made a full and true disclosure of all the relevant facts. It is the case of the petitioner that till date it has not received any intimation or assessment order from the respondent no. 1 in respect of the return of income filed for the assessment year 1991-92. It is the case of the petitioner that thereafter it filed its return for the assessment years 1992-93, 1993-94 and 1994-95, wherein a similar note appeared in the accounts of the respective years.

3. In the course of the Assessment Proceedings for the Assessment Year 1994-95, respondent no. 1 raised a query as to why the capital gains arising on the sale of the premises should not be taxed in the Assessment Year 1991-92. The petitioner in reply to the query filed a detailed letter, dated 18th October 1996, wherein the relevant facts were set out exhaustively. It was also pointed out that the amendments brought out in Section 2(47) by the insertion of Sub-Clauses (v) and (vi) were applicable only to transactions entered into after the Assessment Year 1988-89. The petitioner also pointed out that possession of the premises had been handed over prior to 1st April 1987, the amendment brought about in the definition in Section 2(47), therefore, could not be applicable for the Assessment Year 1991-92. It was also pointed out that the mere exercise of the option by the Bank would not result in a

transfer as the expression is understood in Section 2(47) of the Act. In these circumstances, the petitioner called upon the respondent no.. 1 to drop the proceedings. It is the case of the petitioner that respondent no. 1 had fixed a hearing on 29th October 1996. The petitioner appeared before the Commissioner and as desired furnished details under cover of letter dated 5th November 1996. It is the case of the petitioner that respondent no. 1 thereafter completed the assessment for the Assessment Year 1994-95 by an Order, dated 4th December 1996, under Section 143(3) and assessed the petitioner to the income returned.

It is the case of the petitioner that, therefore, they were shocked and surprised to receive on 12th December 1996 a notice under Section 148 dated 4th December 1996 by which the respondent no. 1 had recorded that he had reason to believe that the petitioner's income chargeable to tax for the Assessment Year 1991-92 had escaped assessment and, therefore, proposed to reassess the income for the Assessment Year 1991-92 and called upon the petitioner to furnish within 30 days from the date of service of the notice a return in the prescribed form. The petitioner by letter, dated 3rd January 1997, had called on the respondent no. 1 to furnish the reasons recorded by him prior to the issue of the impugned notice dated 4th December 1996.

Petitioner contends that till date the petitioner has not received any reply to the said notice. The petitioner thereafter filed the present petition on 13th January 1997. The petition came up for admission before this Court on 27th January 1997, on which date, the learned Bench granted Rule. However, this Court permitted the respondent no. 1 to proceed with the assessment but further ordered that the demand, if any, on the basis of such assessment, could be raised only after obtaining an Order of this Court. The petitioner filed a return of income pursuant to notice, dated 12th February 1997. Petitioner declared Rs. 9,110/- in the return as filed. By letter, dated 12th May 1997, the respondent no. 1 forwarded a copy of the reasons recorded by him prior to the issuance of notice under Section 148. The respondent no. 1 thereafter completed the assessment under Section 143(3) read with Section 147 by an Order dated 28th January 1999. The respondent no. 1 held that on construction of relevant Clauses of the Agreement, it was clear that Clause 5 was inserted only with a view to avoiding payment of capital gain tax immediately. The respondent no. 1 took the view that till the period the Bank of Maharashtra exercised the option of purchase, the Agreement was a leave and licence Agreement between the petitioner and the Bank of Maharashtra. He also came to the conclusion that the sale price was fixed not on the rates prevailing on 19th

June 1994 but the price which was estimated to be the prevailing price in 1989-90 when the buyer exercised the option. Respondent no. 1 held that the contract to sell the property became effective from 12th June 1990, that is, the date on which the Bank exercised its option to purchase the property. The respondent no. 1 also held that the petitioner allowed the buyer to retain the property in part performance from 12th June 1990 and hence the transfer took place in terms of Section 2(27(v)) and on that date capital gains were chargeable.

4. The petitioner filed an appeal to the CIT (Appeals), on 19th April 1999. That appeal was dismissed by Order dated 21st August 2000.

The petitioner has preferred an appeal against the Order of the Commissioner of Income Tax, dated 21st August 2000. The respondent no. 1 thereafter forwarded a demand to the respondent no. 3 for recovery of the amount and issued a notice on 5th March 2003. It is the case of the petitioner that it has duly replied to the notice dated 5th March 2003 and the Summons dated 27th March 2003. Certain disputes that arose between the Bank of Maharashtra and the petitioner have also been set out. It is sought to be pointed out that in view of the proceedings which are pending in the suit filed by the Bank of Maharashtra, the office premises have not

been conveyed or transferred to the Bank of Maharashtra. In the prayer Clauses in the petition an additional prayer clause c(i) has been added to prohibit the respondents etc., from in any manner taking steps or proceedings pursuant to or in implementation of the impugned Demand Notices, dated 6th December 1999, 5th March 2003 and Summons, dated 27th March 2003.

5. At the hearing of the petition on behalf of the respondent no. 1 the learned counsel has raised a preliminary objection as to the maintainability of the petition. It is firstly contended that the petitioner has an efficacious alternate remedy available to show cause to the Assessing Officer, as well as an appeal and also a second appeal against the assessment Order and in the light of that this Court should not exercise its extraordinary jurisdiction. It is also submitted that in the present case, the petitioner has also filed an appeal against the assessment Order passed by the Assessing Officer on 28th January 1999, which is pending before the Income Tax Appellate Tribunal. It is, therefore, submitted that this Court should not exercise its extraordinary jurisdiction on the facts and circumstances of the case. Reliance has been placed firstly on the Judgment of the Division Bench of the Rajasthan High Court in **Rajan Products v. Union of India and another**, (2001) 247 ITR 101. In that case the

Court held that an Assessee has an alternative remedy of filing appeal before the appropriate authority provided under the Income-tax Act, 1961 and no cause of action had arisen for the assessee for filing a writ petition. It is in those circumstances that the High Court declined to exercise its extraordinary jurisdiction. Next reliance is placed in the Judgment of **GKN Driveshafts (India) Ltd. v. Income-Tax Officer and others**, (2003) 259 ITR 19, to contend that when a notice under Section 148 of the Income Tax Act, 1961, is issued, the proper course of action for the noticee is to file the return and, if he so desires, to seek reasons for issuing the notices. In that case on receiving the notices under Section 148, the appellant filed the returns. The appellant also received notices under Section 143(2) calling for further information on certain points in connection with the returns. Thereupon the appellant filed writ petitions challenging the notices. The High Court dismissed the writ petitions holding that the petitions were premature and the appellant could raise its objections to the notices by filing reply to the notices before the Assessing Officer.

On the other hand, on behalf of the respondents, their learned counsel contends that this Court has admitted the petition and once it has admitted

the petition, the issue of jurisdiction is alive for consideration by this Court and in these circumstances the mere fact that the respondents were permitted to carry on the assessment proceedings should not result in this Court declining to exercise its extraordinary jurisdiction. All these objections were available at the time the petition was filed. This Court despite the efficacious alternate remedy available, admitted the petition. Once that be the case the petition shall be disposed off on merits. Our attention is invited to the Judgment of the Apex Court in the case of **Coco-Cola Export Corporation v. Income-Tax Officer and another**, (1998) 231 ITR 200. In that case the High Court had dismissed the petition on the ground that the petitioner had a alternative remedy available under the statute where all the questions raised by the appellant could be examined in detail. The High Court also held that the matter as to the exact scope and ambit of the two letters were awaiting decision at the appellate stage before the Income Tax Authorities and in that view of the matter it did not think fit to give expression to any opinion as to the scope of the two letters as that would seriously prejudice either the appellant or the Revenue and, accordingly, dismissed the petition and directed the Income Tax Officer to make inquiry whether the deduction which had been allowed and which were in excess of the limit fixed by the two letters were legal

or not. The Apex Court held on the facts of that case that the High Court erred in not exercising jurisdiction when the facts were all there and law clear on the subject and, accordingly, set aside the Order and allowed the appeal as filed by the assessee, the appellant before it.

Considering the arguments advanced, in our opinion, it would be inappropriate at this stage after having admitted the petition and further having passed earlier a conditional Order directing the Assessment Officer to proceed with the assessment but to make a demand on the basis of such assessment only after obtaining an Order from the Court to dismiss the petition on that count after six years. In other words, though the petitioner was directed to go before the Assessment Officer, yet this Court retained jurisdiction to decide the issue as to whether it was open to the Assessing Authority to issue the notices. In our opinion, on the facts of the present case, the fact that the petition was entertained eventhough the petitioner had an efficacious alternative remedy, it would be too late in the day, to tell the petitioner to proceed with the appeal before the ITAT as the authorities have already held against the petitioner if we find that the notices issued are without jurisdiction. The preliminary objection raised by the Counsel for the

respondents has to be rejected.

6. Coming to the merits of the matter, on behalf of the petitioner, it is submitted that the re-opening for the reasons recorded are erroneous and bad in law. It is firstly contended that for re-opening an assessment, the Assessing Officer must have valid "reasons to believe", which reasons must have a rational and direct nexus and are intelligible and acceptable in law and do not amount to a change of opinion. Reliance for that is placed on the Judgment of the Apex Court in **Ganga Saran & Sons P. Ltd. v. Income-Tax Officer and others**, (1981) 130 ITR 1. Reliance is also placed on the Judgment of the Apex Court in **Coca-Cola Export Corporation v. Income-Tax Officer and another (Supra)**. It is then submitted that it is the duty of the assessee only to disclose primary facts and not inferences and for that purpose reliance is placed on the Judgment of **Commissioner of Income Tax, Bombay-VIII v. Mangilal Dhanraj**, (1985) 155 ITR 71 of this Court and the case of **Chemicals and Fibres of India Ltd. v. M.K.N. Pillai and another**, (1984) 146 ITR 280 again of this Court. It is then submitted that under the Scheme of the Act for there to be a valid re-opening, information must come from extraneous source. Otherwise, irrespective of whether an assessment is made or not, it would mean that where a return has been processed under Section 143(2)

and found by the then Officer not to have understated any income on the basis of the very same documents, reassessment under Section 147 can be made on the same grounds that the assessee had understated the income. This would render the limitation contemplated by the Act under Section 143(2) as totally meaningless. Reliance for the proposition that only extraneous information can be relied upon is placed on the Judgment of **Andhra Bank Ltd. v. Commissioner of Income Tax**, (1997) 225 ITR 447. It is then submitted that the position of law pre 1988 and post 1988 is the same qua the fact there cannot be a change in the opinion on the same facts irrespective of whether an assessment is made under Section 143(1) or otherwise. Reliance for that is placed on the Judgment of the Full Bench of the Delhi High Court in **Commissioner of Income-Tax v. Kelvinator of India Ltd.**, (2002) 256 ITR 1. Reliance is also placed on the Judgment of **United Electrical Co. P. Ltd. v. Commissioner of Income-Tax and others**, (2002) 258 ITR 317 of the Delhi High Court. It is also submitted that the word 'noticed' which also means information, intelligence, as referred to in Webster's Dictionary and Random's House, also shows that the position post 1988 is *pari materia* with the old provision of law. Position of petitioner's return for the assessment year 1991-92 as stated by the respondents in their affidavit-in-reply clearly shows that they were

processed in accordance with law and, therefore, there are only two possibilities following from the respondents assertions (a) summary assessment made under Section 143(1)(a) on the petitioner but no Section 143(2) notice issued as the then Assessing Officer was of the opinion that the assessee has not understated its income on examination of the Return of Income and (b) no summary assesement under Section 143(1)(a), but the Assessing Officer still not exercising his rights under Section 143(2) and thus, obviously satisfied that in the return of income that there was no understatement of income. In either case it is contended that the exercise in 1996 was an attempt to invoke the jurisdiction based on the same documents from the return of income clearly discloses change of opinion on the same facts and must be held to be contrary to law. Reference is placed on the CBDT Circular, which has been considered in the Judgment of the Delhi High Court in the case of **Commissioner of Income-Tax v. Kelvinator of India Ltd. (Supra)**.

It is then submitted that the reasoning of the Officer that sub-clause (v) of Section 2(47) would apply is erroneous for the following reasons: (1) in respect of premises of a Co-operative Society represented by shares of the society sub-clause (v) has no application and for there to be a valid transfer there must be a

transfer of shares of a society and thereafter sub-clause (vi) of Section 2(47) would apply. Reliance is placed on the Circular explaining the provision at the time of introduction of sub-clauses (v) and (vi) issued by the Central Board of Direct Taxes; (2) when the Officer himself accepts in the reasons for re-opening that the Agreement to sell coupled with possession as contemplated in Section 53A is done in 1984 when the sub-clause (v) was not on the statute, the question of that sub-section applying does not arise; (3) option exercised by the purchaser is merely to complete formalities to sell, it does not amount to an Agreement to sell for the following reasons, namely, that for a valid Agreement under Section 53A it must be signed by the transferor, it should be a contract for consideration, should be in writing and the Transferor should deliver possession subsequent to the Agreement for Sale. Reliance for that is placed on the Judgment of the Division Bench of this Court in **Chaturbhuj Dwarkadas Kapadia v. Commissioner of Income-Tax**, (2003) 260 ITR 491 and also of the Apex Court in **Mool Chand Bakhru and another v. Rohan and others**, (2002) 2 S.C.C. 612. It is then submitted that it is inconceivable to contemplate that having accepted that there was an Agreement for Sale coupled with possession in 1984, in respect of the same premise and in respect of the same parties and under the same Agreement there could be a

fresh agreement to sell coupled with possession in 1991. The reasons itself would show the errors in the Officer's reasoning. It is further submitted that Section 53A applies where possession already exists in a character other than under the Agreement to sell which changes the character and therefore possession must always follow an Agreement or change character post Agreement. Reliance is placed in the Judgment of **Sardar Govindrao Mahadik and another v. Devi Sahai and others**, 1982 (1) SCC 237. It is then submitted that letter of 12th June 1990 by the Bank of Maharashtra can never amount to an Agreement to Sell as an Agreement by its nature contemplates two parties and shows meeting of mind for example as to who has to bear the stamp duty etc.. Lastly it is submitted that as per the recorded reasons the exercise of option by the Bank of Maharashtra does not amount to an Agreement to Sell as it is a mere letter calling upon the petitioners to complete the formalities of sale. Prior to the amendment in Section 2(47)(v) in respect of immovable property, an Agreement to Sell coupled with possession without execution of a conveyance did not amount to a transfer under the Income Tax Act rendering income chargeable to tax under the head Capital Gains. Reliance is placed on the Judgment of **Alapati Venkataramiah v. Commissioner of Income-Tax, Hyderabad**, (1965) 57 ITR 185 and **India Finance and Construction Co.**

Pvt. Ltd. v. B.N. Panda, Deputy Commissioner of Income-Tax and another, (1993) 200 ITR 710.

7. On the other hand, on behalf of the respondent revenue, it is contended that the present case is not a case of issuing of notice after scrutiny assessment under Section 143(3), but non-scrutiny assessment under Section 143(1) and as such extended period of limitation is available under Section 149 of Income Tax Act and, in any case, it has been exercised within 4 years from the end of the relevant assessment year, that is, within 4 years from 1991-92. It is then submitted that the petitioner has not disclosed any jurisdictional error committed by the Assessing Officer while issuing the impugned notice and as such the challenge for quashing the impugned notice does not survive. The learned counsel then points out that in view of the amendment to Section 2(47) of the Income Tax Act, introducing clause (v) any transaction involving the allowing of possession of any immovable property to be taken or retained in part performance of contract under Section 53A of the Transfer of Property Act and in view of option exercised by the Bank of Maharashtra by letter dated 12th June 1990 exercising their option to complete the sale in respect of the said premises in pursuance of clause (5) of Agreement dated 19th June 1984 and in the light of the admitted position by the petitioner by letter dated

16th June 1993 confirming to take steps before 30th September 1983, the transaction is deemed to have been completed on exercise of option by the Bank under Sub-Clause (v) to Section 2(47) of the Income Tax Act. It is, therefore, submitted that the Assessing Officer was justified in re-assessing the income of the assessee by issuing notice under Section 147 read with Section 149(1) and hence the impugned notice is valid. The next submission is that the assessee had filed returns for assessment year 1991-92 which was processed as non-scrutiny assessment under Section 143(1) of the Income Tax Act. The Assessing Officer was justified in issuing notice under Section 147 on the ground that income chargeable to tax escaped assessment under Explanation 2 to Section 147, as the Assesses had understated the income of Rs. 84,47,111/-, as current liability, though the transaction in respect of sale of said premises had been completed on exercising the option by the Bank by letter dated 12th June 1990 in pursuance of Clause (5) of Agreement, dated 9th June 1984. It is then submitted that by virtue of amendment to Section 2(47) introducing Clause (v) with effect from 1st April 1988, transactions under Section 53A of the Transfer of Property Act, have been included in the definition 'transfer' in relation to capital assets, which has taken place in the present case on 12th June 1990 by exercise of option by the Bank which is clearly

falling in the Assessment year 1991-92. The impugned notice, it is therefore contended, having been issued within 4 years from the relevant assessment year, was valid in law. Section 147, it is then submitted, as it stood earlier has undergone a radical change after introduction of changes in Sections 147 with effect from 1st April 1989, whereby the scope of re-assessment has been widened and the only restriction put in the amended Section is 'reason to believe' by the Assessing Officer, who can exercise the powers to reopen assessment within 4 years. Dealing with the amendments as carried out, it is submitted that the petitioner is seeking to convert the present petition into an appeal, requiring this Court to go into merits of the case, which is not permissible except by Second Appeal under Section 260A of the Income Tax Act, only on substantial question of law, which the petitioner has done.

8. In the light of the above, it will have to be decided whether before the Assessing Officer there was material to hold that he had reason to believe, while issuing to the petitioner the notice dated 4th December 1996. In the instant case there is no dispute that the petitioner is sought to be assessed for capital gains on the ground that there was an Agreement of Sale entered into by the petitioner and the Bank of Maharashtra. The Agreement of Sale was not falling within the ambit of

Section 2(47) of the Income Tax Act when entered into. Section 2(47) of the Income Tax Act came to be amended by the Finance Act, 1987 with effect from 1st April 1988. Two sub-clauses were added, namely, (v) and (vi) of which sub-clause (v) reads as under:-

"(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in Section 53A of the Transfer of Property Act, 1882."

The position before the amendment is as can be seen from the Judgment of the Apex Court in the case of **Alipati Venkataramiah v. Commissioner of Income-Tax, Hyderabad** (Supra). In that case an agreement was entered into on March 17, 1948, with one V to sell all assets for a consideration. On March 17, 1948 the appellant handed over possession of the land and buildings and machinery to the company. On March 20, 1948, the company credited the sum of Rs. 2 lakhs in its accounts in favour of the appellant and the appellant also made appropriate entries in his own account books. The sale deed in respect of the land was executed in favour of the company on November 22, 1948. The agreement was approved by the Board of Directors of the company only on March 16, 1949, and by the shareholders of the company at a general meeting on April 10, 1949. The

question was whether capital gains arose from the sale in the previous year ending March 31, 1948, relevant to the assessment year 1948-49. The Apex Court held in that case that before Section 12B of the Indian Income-tax Act, 1922, could be attracted, title must pass by any of the modes mentioned in Section 12B, that is, sale, exchange or transfer. 'Transfer' therein meant effective conveyance of the capital asset to the transferee. Delivery of possession of immovable property could not by itself be treated as equivalent to conveyance of the immovable property. A similar view was taken by a Division Bench of this Court in **India Finance and Construction Co. Pvt. Ltd. v. B.N. Panda, Deputy Commissioner of Income-Tax and another**, (1993) 200 ITR 710. In that case agreements were dated April 3, 1967 and April 1, 1982. After the amendment, agreements in the nature of Section 53A of the Transfer of Property Act, 1882 can now be assessed for capital gains. A Division Bench of this Court in **Chaturbhuj Dwarkadas Kapadia v. Commissioner of Income-Tax** (Supra) was considering when Section 53A would be attracted consequent to a transaction which had come into force after 1st April 1988, that is, after amendment to Section 2(47). The learned Division Bench noted that in order to attract Section 53A the following conditions need to be fulfilled: (1) there should be a contract for consideration; (2) it should be in writing; (3) it

should be signed by the transferor; (4) it should pertain to transfer of immovable property; (5) the transferee should have taken possession of the property and (6) the transferee should be ready and willing to perform his part of the contract. In **Mool Chand Bakhru and another v. Rohan and others** (Supra) the Apex Court was considering whether certain letters exchanged between the parties would amount to an agreement to sell. In that case there was an oral agreement to sell, by exchange of letter by the appellant one M to B. The Apex Court noted that that could not be termed as an agreement to sell. At the most it was an admission of an oral agreement to sell and not a written agreement. The Apex Court went further to hold that under Section 53A of the Transfer of Property Act, the emphasis is not on a written agreement only. In addition, the emphasis is on the terms of the agreement as well which can be ascertained with reasonable certainty from the written document. The Apex Court on the facts of that case held that there was no meeting of minds. Admission made by M of an oral agreement to sell did not spell out the other essential terms of the agreement to sell such as the time-frame within which the sale deed was to be executed and as to who would pay the registration charges etc.. Considering that the Apex Court held that the letters written by M cannot be taken to be an agreement to sell within the meaning of Section 53A spelling out the terms

of an agreement for sale.

Having seen what is required under Section 53A of the Transfer of Property Act, let us now examine whether there was material before the Assessing Officer for 'reasons to believe' that the income chargeable with tax has escaped assessment for any assessment year. The question then is what is the meaning of the expression 'reason to believe'. It is no doubt true as is pointed out by the Revenue relying on the Judgment of **Raymond Woollen Mills Ltd. v. Income-Tax Officer and others** (Supra) that there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at the stage of issuing of notice. In **Dr. Amin's Pathology Laboratory v. P.N. Prasad, Joint Commissioner of Income-Tax and others**, (2001) 252 ITR 673 was a case where the original assessment was made under Section 143(3) and re-assessment after four years. The Court observed that there should have been failure to disclose material facts necessary for assessment and mere production of balance-sheet or account books would not amount to disclosure of material facts necessary for assessment. No doubt this was relied upon by the Revenue to point out that merely because of the note which was there before the Assessing Officer as disclosed by the

petitioner for the assessment year 1990-91, would not amount to disclosure of material facts necessary for assessment. However, what is material to note is the further observation that 'reason to believe' has to be a reason of a prudent person. That reason should be fair and not necessarily due to failure of the assessee to disclose fully or partially some material facts relevant for assessment. In **Ganga Saran & Sons P. Ltd. v. Income-Tax Officer and others**, (1981) 130 ITR 1 the Apex Court was considering the words 'reason to believe' as then appearing in the Income Tax Act. The Apex Court held that the belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under Section 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on fact and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that

any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid. **Coca-Cola Export Corporation v. Income-Tax Officer and another** (Supra) was a case of re-opening of assessment of the assessment years 1971-72, 1972-73 and 1973-74 under Section 148 of the Income Tax Act. Two grounds were mentioned for re-opening the assessments for the assessment years 1971-72 and 1973-74. One of the grounds raised was that in the regular assessments, the Income Tax Officer had wrongly allowed excess deduction of pro rated home office expenses and service charges and that the deduction which was permissible could only be allowed to the extent mentioned in letters dated May 4, 1973 and November 6, 1974 of the Government of India, Department of Economic Affairs, to the appellant. Dealing with these letters, the Apex Court held that the embargo so placed by these two letters had nothing to do with the amount of disallowances under the Income Tax Act. The Court further proceeded to hold that, that could not be a ground for the Income Tax Officer to assume jurisdiction to start reassessment proceedings either under Section 147(a) or Section 147(b) of the Act on the ground that it would be "in consequence of information". In **Commissioner of**

Income-Tax, Bombay-VIII v. Mangilal Dhanraj (Supra) a Division Bench of this Court noted that what is the duty of the assessee was to disclose relevant facts. In that case the facts had been disclosed and in those circumstances, the Court interfered with the notice issued. In **Andhra Bank Ltd. v. Commissioner of Income-Tax** (Supra) in the matter of assessment year 1958-59 the method of accounting was accepted by the Income Tax Officer. In the matter of assessment for the years 1960-61, 1961-62 and 1962-63. The Apex Court noted that for exercise of jurisdiction under Section 147(b) could only be, when information came from an extraneous source and in that case there was no information available for the Assessing Officer on the basis of which he could reopen the assessment. This was a case of mere change in opinion and, therefore, the assessments had not been validly reopened under Section 147(b) of the Income Tax Act, 1961. It is no doubt true that on behalf of the Revenue it was pointed out that Section 147 after its amendment has undergone a radical departure from the Section as it stood before its amendment. Even if that be so, in our opinion, insofar as the facts of the present case are concerned, we need not go into that aspect, even assuming that the Income Tax Officer could have relied on the letter which he proposed to rely apart from the note, which was forming a part of the balance-sheet and statement of account. A

Full Bench of the Delhi High Court considering Section 147 after its amendment in the case of **Commissioner of Income-Tax v. Kelvinator of India Ltd** (Supra), after reviewing several Judgments, considered the Circular issued by the Central Board of Direct Taxes, wherein it was set out that the mere change of opinion cannot form the basis of re-opening a completed assessment. Another Division Bench of the Delhi High Court in the case of **United Electrical Co. P. Ltd. v. Commissioner of income-Tax and others** (Supra) observed that when a challenge is made to an action under Section 147, what the Court is required to examine is whether some material exists on record for the Assessing Officer to form the requisite belief and the reasons for the belief have a rational nexus or a relevant bearing to the formation of such belief and are not extraneous or irrelevant for the purpose of that Section.

9. Therefore, having considered the law as it stands, the question now would be whether on the facts of this case, the Assessing Officer was right in issuing the notice, which is impugned. The reasons for reassessment are as under:-

"It is noticed from Schedule 'D' forming notes annexed to and part of the Balance sheet as at 31-3-1994 enumerating significant Accounting Policies that as per note 2 the assessee entered into an agreement to sale a building dt. 19-6-1984 to Bank

of Maharashtra for Rs. 85,40,800/- on the condition that the sale will be completed only after fifth year of the agreement but before the expiration of the sixth year at the option of the purchasers and the purchaser can rescind the same at certain consideration. The assessee has received 95% of the consideration and also has given the possession of the property to the purchasers. During the course of the assessment proceedings for asst. year 1994-95 it was gathered that the purchaser has on 12-6-1990 i.e. before the expiry of the sixth year of the original agreement has exercised the option given in that agreement to purchase the property and requested the assessee to complete the formalities of conveying the property to them before 18th June 1990. However the conveyance is not yet drawn and the assessee has also not offered the capital gains on sale of the building in any assessment year. In my opinion the provisions of sub-clause (v) in the definition of transfer u/s 2(47) are clearly applicable in the assessee's case as the transaction falls within the situation contemplated by section 53A of the Transfer of Property Act, 1882 and has to be treated as transfer on the date of which the bank exercised its option to buy the building i.e. on 12.6.1990 falling within asst. year 1991-92. since the assessee has not offered any capital gains for taxation during asst. year 1991-92, income to that extent has escaped assessment. Issue notice u/s 148 read with section 147 of the Act."

From the above what can be seen is that the Assessing Officer has first noticed Schedule 'D' forming notes annexed to and part of the balance sheet as on 31st March 1994. The said notes can be seen from other documents on record and they appear in the balance sheet for the year 1991-92. That note showed that an

agreement to sell a building dated 19th June 1984 for a consideration and on a condition that the sale would be completed only after the fifth year of the agreement and before the expiry of the sixth year at the option of the purchasers and the purchaser can rescind the same on certain consideration. The assessee had received 95% of the consideration and had also given possession of the property to the purchaser. During the course of the assessment proceedings for assessment year 1994-95 it was gathered that the purchaser had on 12th June 1990, that is, before the expiry of the sixth year of the agreement has exercised the option to complete the conveying of the property to them before 18th June 1990. The reason then shows that no conveyance was drawn up and the assessee has also not offered the capital gains on sale of the building in any assessment year. The Assessing Officer then proceeded that in his opinion the provisions of sub-clause (v) in the definition of transfer under Section 2(47) are clearly applicable in the assessee's case. Therefore, what the respondent Assessing Officer proceeded was based on the agreement of 19th June 1984 and the fact that the purchaser had on 12th June 1990 exercised his option to purchase and to complete the formalities of conveyance.

Two things emerge from this, firstly, based on this material, could it be said that any prudent or

reasonable person, reasonably instructed in law, could have come to the conclusion that an agreement as contemplated by Section 53-A of the Transfer of Property Act had been entered into for the Assessment Year 1991-92? and secondly, whether, even if an agreement had been entered into, were the predicates of Section 2(47) as noted by this Court in the Judgment in the case of **Chaturbhuj Dwarkadas Kapadia v. Commissioner of Income-Tax** (Supra) met? In the first instance there is no dispute that the only agreement between the parties is an Agreement of 1984. In the Agreement under Clause (v) the conveyance was agreed to be completed after the expiry of the fifth year and before the expiry of the sixth year from the date of the Agreement. At the relevant time, considering the Clause in the Agreement, to take possession by paying 95% of the consideration, the Bank of Maharashtra paid to the petitioners 95% of the consideration and the petitioners also put the Bank of Maharashtra in possession. It is pursuant to this Agreement of 1984 that the Bank of Maharashtra continued to be in possession. Clause 5 by itself gave an exercise of option to the purchaser to call on the petitioner to specifically perform the contract cannot by any stretch of imagination be said to mean and include that a contract had come into existence on the date the Bank of Maharashtra issued notice to the petitioner for specific performance of the contract.

For a transaction to amount to transfer within the meaning of Section 2(47), the minimum requirements were that there had to be agreement between the parties, signed by the parties, it should be in writing, it should pertain to transfer of property, the transferee should have taken possession of the property etc.. In the instant case none of the requirements as set out in **Chaturbhuj Dwarkadas Kapadia v. Commissioner of Income-Tax** (Supra) have been satisfied. Therefore, it cannot be said that in 1991-92 an Agreement to Sell had come into effect/existence. The Assessing Officer could have issued the notice if there was prima facie such material before him to hold that an Agreement as contemplated by Section 53-A had come into existence for the assessment year 1991-92. There was, prima facie, no material at all before the Assessing Officer. It is true that if there was material, this Court ordinarily would not exercise jurisdiction. However, in the instant case there was no material for the Assessing Officer to have reason to belief that the Agreement to sell had been entered into in the Assessment Year 1990-91, which had escaped assessment.

10. In our opinion, therefore, the entire exercise of jurisdiction by the Assessing Officer is without jurisdiction. Once that be the case, the notice issued will have to be quashed. It is true that in the

meantime orders have been passed including in the appeal but, in our opinion, those orders will have to be set aside, as being orders without jurisdiction.

11. In the light of that Rule is made absolute in terms of prayer clauses (a) and (b) as also prayer clause (c) (i). In the circumstances of the case there shall be no order as to costs.

(F.I. REBELLO)
JUDGE.

(P.V. HARDAS)
JUDGE.

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